# STATE OF MICHIGAN

# COURT OF APPEALS

GERALDINE KATZMAN,

Plaintiff-Appellant,

v

ORION CONSTRUCTION COMPANY and GARY WILLIAMS,

Defendants-Appellees.

UNPUBLISHED
August 17, 2006

No. 268006
Oakland Circuit Court
LC No. 2005-063469-NO

Before: Saad, P.J., and Jansen and White, JJ.

PER CURIAM.

In this negligence action based on a contract for snow plowing and salting of the University Square Mall ("mall") parking lot, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants.[1] We reverse and remand for further proceedings.

Plaintiff alleges that she tripped and fell in the mall's parking lot on January 10, 2002, when she stepped on a large piece of rock salt that was covered and obscured by approximately two inches of snow. Plaintiff contends that the piece of rock salt was left behind by defendants, who were under contract with the mall to provide salting and snow removal services. Defendants had last plowed and salted the mall's parking lot four days earlier, at which time they spread seven tons of rock salt throughout the parking lot.

During her deposition, plaintiff testified that after she got out of her vehicle in the parking lot and began walking toward the mall, she "felt [herself] step on something" with her left foot, and subsequently fell to the ground. Plaintiff testified that she had been watching the ground as she walked, but that she had not seen the object on which she tripped because it had been covered by snow. Plaintiff testified that immediately after she fell, she looked behind her and saw a large piece of rock salt where she had fallen. Plaintiff's fall occurred during daylight hours.

[1] Defendant Williams was president and chief operating officer of defendant Orion Construction Company.

Plaintiff and her husband both testified that a passerby pointed out the piece of rock salt, surmising that it was the object on which plaintiff had tripped. Although plaintiff testified that the passerby was an older woman, neither she nor her husband could identify the individual. Plaintiff and her husband photographed the baseball-sized piece of rock salt, as well as three other similarly sized pieces of rock salt that plaintiff's husband allegedly gathered when he returned to the mall's parking lot after the incident. Plaintiff's husband testified that when he returned to the parking lot, he found numerous large pieces of rock salt under the snow.

Defendant Williams recalled that his company had most recently plowed and salted the mall's parking lot on January 6, 2002. Williams testified that seven tons of rock salt had been spread in the parking lot on that day. Williams maintained that his company never spread large pieces of rock salt such as those photographed by plaintiff and her husband. However, Williams also testified that large chunks of rock salt occasionally become lodged in the spreading apparatus on defendants' trucks.

The trial court granted summary disposition for defendants, finding that plaintiff had offered only conjecture and speculation to support the theory that she had tripped and fallen on the snow-covered piece of rock salt. The trial court also observed that even if plaintiff had sufficiently established the causal mechanism of her fall, she could not establish that defendants owed her a duty that was separate and distinct from their contractual obligation to plow and salt the parking lot.

Although defendants moved for summary disposition pursuant to both MCR 2.116(C)(8) and (C)(10), the trial court did not specify the subrule under which it granted the motion. However, because it is evident that the court considered documentary evidence outside the pleadings, we will review the motion as having been granted under MCR 2.116(C)(10). *Panhandle Eastern Pipe Line Co v Musselman*, 257 Mich App 477, 480; 668 NW2d 418 (2003). We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The pleadings, affidavits, admissions, depositions, and other admissible documentary evidence must be viewed in the light most favorable to the nonmoving party. *Id*. When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In addition, the existence of a legal duty is a question of law, which we review de novo. *Moning v Alfono*, 400 Mich 425, 438; 254 NW2d 759 (1977).

Defendants argue, and the trial court agreed, that plaintiff offered nothing more than mere speculation and conjecture to establish that she had tripped and fallen on a piece of rock salt. We disagree.

It is well-settled that an action for negligence requires a plaintiff to prove four elements: duty, breach, causation, and damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The concept of causation encompasses two distinct ideas: cause in fact and proximate causation. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994). Cause in fact requires a showing that, but for the defendant's negligence, the injuries would not

have occurred. *Id.* at 163. "While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause." *Craig v Oakwood Hosp*, 471 Mich 67, 87; 684 NW2d 296 (2004) (emphasis in original). Thus, a plaintiff cannot show cause in fact by alleging only that the defendant's conduct may have cause the injuries. *Id.* "Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he 'set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect.'" *Id*., quoting *Skinner, supra* at 174.

Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences, not mere speculation. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003). "An explanation that is consistent with known facts but not deducible from them is impermissible conjecture." *Id.* Similarly, negligence is not established if the evidence lends equal support to two or more inconsistent hypotheses. *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999).

Here, plaintiff testified that immediately before she fell, she "felt [herself] step on something" with her left foot. Although plaintiff could not specifically identify the foreign object on which she had stepped at that time, plaintiff specifically identified the object as a piece of rock salt immediately after her fall. Plaintiff testified that directly after she fell forward, she looked backward and saw a large piece of rock salt that had previously been concealed under the snow. Plaintiff affirmatively testified that the particular piece of rock salt was the object on which she had tripped.

Unlike the cases cited by defendants in which the plaintiffs offered inconclusive or purely speculative hypotheses regarding the causal mechanisms of their falls,[2] plaintiff in the case at bar has specifically testified that she stepped on a large piece of rock salt, which caused her to trip and fall in the mall's parking lot. Accordingly, plaintiff's theory of causation is not premised on mere speculation and conjecture. *Skinner, supra* at 174. Nor can it be said that plaintiff's theory of causation is not logically deducible from the evidence presented in this case. *Wiley, supra* at 496. Plaintiff's testimony "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." *Id.* Viewing the evidence in a light most favorable to plaintiff, reasonable minds could conclude that plaintiff's fall was caused by tripping on a piece of rock salt that was concealed beneath the snow in the mall's parking lot.[3]

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[2] Contrary to defendants' contention, the facts of *Stefan v White*, 76 Mich App 654; 257 NW2d 206 (1977), and *Trotter v Perkins*, unpublished opinion per curiam of the Court of Appeals, issued August 4, 2005 (Docket No. 253173), are distinguishable. In those cases, the plaintiffs offered no reasonable theories of causation with respect to their falls. In contrast, plaintiff in the instant case has specifically identified a causal mechanism that finds support from facts in evidence.

[3] We reject defendant's fleeting and poorly articulated contention that plaintiff presented insufficient evidence to link the rock salt to defendants. The uncontested evidence showed that defendants had spread seven tons of salt in the mall's parking lot four days before the incident

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Defendants also argue, as the trial court ruled, that even if plaintiff presented sufficient evidence of causation, defendants did not owe a duty that was separate and distinct from their preexisting contractual obligation to plow and salt the parking lot. We disagree.

"The threshold question for negligence claims brought against a contractor on the basis of a maintenance contract between a premises owner and that contractor is whether the contractor breached a duty *separate and distinct* from those assumed under the contract." *Fultz v Union-Commerce Associates*, 470 Mich 460, 461-462; 683 NW2d 587 (2004) (emphasis added). "'It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff.'" *Id*. at 463, quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). If no independent duty exists, no tort action based on a contract will lie. *Fultz, supra* at 463. Therefore, the question in this case is whether defendants owed plaintiff a duty that was "separate and distinct" from their preexisting contractual obligation to plow and salt the mall's parking lot.

If a defendant creates a new hazard, even in the course of performing a contract, a duty that is separate and distinct from the defendant's contractual obligations is established. *Id.* at 468-469. In *Fultz*, our Supreme Court cited *Osman v Summer Green Lawn Care*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999), as an example of a case in which a third party alleged a duty that was "separate and distinct" from the defendant's underlying contractual obligations. The Court found that there was an independent duty in *Osman* because the defendant had created a new hazard by moving snow to a location where it knew or should have known that melting and refreezing would pose a hazardous condition for pedestrians. *Fultz, supra* at 469. Similarly, in the case at bar, plaintiff argues that defendants created a new hazard by leaving behind large pieces of rock salt that they knew or should have known would pose a danger to people walking in the parking lot.

"[A]ccompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and . . . a negligent performance constitutes a tort as well as a breach of contract." *Id.* at 465, citing *Clark v Dalman*, 379 Mich 251, 260-261; 150 NW2d 755 (1967). The common law "imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, or to so govern his actions as not to unreasonably endanger the person or property of others." *Id*. at 261.

Defendants' preexisting contractual duty in this case was to plow and salt the mall's parking lot, presumably to protect mall patrons against hazards posed by snowy and icy conditions. Plaintiff contends that defendants breached a *different* duty—the duty to prevent the foreseeable danger of tripping and falling on rock salt concealed beneath the snow. This was a "separate and distinct" obligation, which arose out of the common-law duty of reasonable and ordinary care that attached to defendants' performance of its contractual duties. *Fultz, supra* at 463-464. Because it was reasonably anticipatable that large pieces of rock salt left in the parking

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underlying this case. Further, there was no evidence that anyone other than defendants was responsible for spreading salt in the parking lot. In short, reasonable minds could conclude that defendants were responsible for spreading the rock salt that is at issue in this case.

lot would become concealed under the snow and pose a tripping hazard to mall patrons, we conclude that defendants owed plaintiff the duty to use ordinary care in preventing such foreseeable harm.

Although we express no opinion regarding the ultimate outcome of this case, we find as a matter of law that defendants owed plaintiff a separate and distinct duty to prevent the foreseeable risk of harm posed by large and concealed pieces of rock salt in the mall's parking lot. Just as the factfinder must ultimately decide the question of causation in this case, it is for the factfinder to determine whether defendants in fact breached their duty by unreasonably leaving behind the rock salt on which plaintiff allegedly tripped and fell.

Reversed and remanded for further proceedings consistent with this opinion.[4] We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Helene N. White

[4] We express no opinion regarding whether plaintiff's own actions may have contributed to her injuries in this case. However, as plaintiff conceded before the trial court, any eventual recovery must be offset by the degree to which plaintiff may have been comparatively negligent. MCL 600.2959.